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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MAKHANDA)**

Reportable/Not Reportable

Case no.: 3615/2023

Matter heard on: 15 August 2024

Judgment delivered on: 22 August 2024

In the matter between:

Z[...] F[.]

Applicant

obo Y[...] A[...]F[...]

and

ENOCH MGIJIMA LOCAL MUNICIPALITY

Respondent

AND

CASE NO: 3616/2023

MXOLISI QUINTON MASAYIMANI

Applicant

and

ENOCH MGIJIMA LOCAL MUNICIPALITY

Respondent

JUDGMENT

BRODY AJ

1. These are two matters by applicants against the Enoch Mgijima Municipality (“the municipality”) in case no: 3615/2023 and case no: 3616/2023. As both matters involve the same defendant, the same legal teams, and are applications to this court for an order in terms of section 3(4) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002, relating to the condonation for the applicants’ failure to serve a notice of intention to bring legal proceedings against the municipality, I will give one judgment in respect of both matters. I will refer to the first matter as Ms F[...]’s claim, and the second matter as Mr Masayimane’s claim.

2. Ms F[...] brought action proceedings against the municipality in her personal capacity and on behalf of her minor son, Y[...] A[...]F[...] (“the minor child”) arising out of the electrocution of the minor child on the 17th of February 2020 at A[...] T, Squatter Camp, Komani (Queenstown). The minor child accidentally came into contact with a live electric cable when he was playing with other children and was electrocuted, which resulted in severe bodily injuries and disfigurement to his left hand. After an operation in Livingstone Hospital the minor child underwent physical therapy and at the time of the electrocution, the minor child was 7½ years old.

3. The incident was reported to a Ward Councillor of the municipality and also to the South African Police Services in Komani.

4. Ms F[...], at the time, did not know that she had a civil claim and a right to sue anyone pursuant to her son’s electrocution. She also alleged in her application to this court, for condonation, that despite not knowing that she had a potential claim, she did not know specifically what Organ of State a potential claim might lie. She indicated that as a layperson, she laboured under the mistaken impression that the police would investigate the matter and take the matter to court on her behalf and she did not appreciate the difference between a criminal case and a civil case. It was only on the 24th of June 2023 that she learnt from members of the community who reside in A[...]

Squatter Camp, Komani, that there was a possibility of a claim against the municipality, and with the assistance of an attorney in East London.

5. The next day she consulted her attorney and he immediately opened a file and did the necessary investigations.

6. On the 6th of October 2023 a notice in terms of section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (“the Act”) was served on the municipality. Summons was issued and served on the 10th of October 2023.

7. The defendant then defended the matter and on 13 December 2023 the municipality raised a special plea to the effect that Ms F[...] had not complied with section 3(2) of the Act in that she did not serve the notice in terms of section 3 of the Act timeously.

8. Ms F[...]’s personal claim is in the substantial sum of R5 000 000.00 for *inter alia* “extreme trauma, emotional shock, suffering, discomfort and loss of enjoyment of the amenities of life”. The minor child’s claim is in the substantial sum of R15 000 000.00 which *inter alia* includes general damages, future hospital and medical expenses, and future loss of earnings/loss of earning capacity.

9. The municipality in its special plea raised prescription as a defence and alleged that the debt became due on 20 February 2020 and the debt prescribed on 20 February 2023. The special plea of prescription, understandably, was in respect of Ms F[...]’s personal claim as the minor child had not yet reached the age of majority. The defendant also raised a special plea in regard to the failure to timeously serve and file the section 3 notice, however, did not plead why the failure to do so would be prejudicial to the municipality.

10. Ms F[...] then filed a replication in which she raised the issue that she was not aware at any time before she met her attorneys that she had the right to sue for damages, and the identity of the municipality.

11. In the application for condonation the municipality alleged that there was prejudice to it arising out of the fact that employees of the respondent who may have investigated the scene of the electrocution may not have independent recollection of their investigation and inspections, given the long delay in receiving notice of the claim.

12. According to the municipality memories of witnesses, who will be required to give testimony, may have faded and become unreliable. It was the sole reason given by the municipality for prejudice.

13. Ms F[...]’s reply to the allegations of prejudice are that the municipality filed a detailed plea in the matter and this included a detailed opposition to the application for condonation. This, in her view, indicated that the municipality was able to investigate and assess the claim. A further point made by her was that the municipality should have records of the complaints raised by members of the public in respect of the electricity connections and, in fact, had a duty to report the connections if they were, as alleged, illegal connections. She further alleged that the municipality should have records, or knowledge of the electrocution, from the report to the Ward Councillor. In addition to this, although not alleged by Ms F [...], there would have been the police records that were available to the municipality when the matter was referred to the police by Ms F[...] shortly after the electrocution.

14. Mr Masayimane is an unemployed male who was born on the 1st of December 1983 and who also resided at A[...] T, Squatter Camp, Komani. He was physically disabled as a result of his electrocution and his highest level of education was a Grade 11.

15. On or about 19 February 2020, and at the squatter camp, Mr Masayimane was electrocuted when he accidentally came into contact with live electric cables and this resulted in his hospitalisation.

16. As a result of the electrocution he lost the use of his left arm, which was permanently disabled, despite being treated by Frontier Hospital and undergoing physiotherapy.

17. It was during May 2023 that he met a resident of the squatter camp who advised him that he had a civil claim against the municipality and that he should refer the matter to an attorney.

18. He consulted with an attorney on the 24th of June 2023, and after investigation by the attorney, together with the obtaining of medical records, the section 3 notice in terms of the Act was served on the municipality on the 3rd of October 2023.

19. On the 11th of October 2023 the summons was issued and served and he too has a substantial claim against the municipality in the sum of R15 000 000.00 for *inter alia* general damages, future hospital and medical expenses, future loss of earnings/loss of earning capacity, and costs.

20. The municipality served a special plea and plea-over on the 13th of December 2023 and raised the issue of prescription and non-compliance with section 3 of the Act.

21. When opposition to the application for condonation was filed, the municipality alleged that the applicant was at all times aware, or ought reasonably to have been aware, of the identity of the municipality and that he had a claim against the municipality.

22. The municipality also alleged prejudice in receiving the section 3 notice so late, and once again alleged that the memories of those who needed to testify would not be reliable given the passage of time. The municipality alleged that it would not be able to locate records of the alleged electrocution given the delay in receiving the notice. This was the sole reason given for the alleged prejudice.

23. Mr Masayimane's replying affidavit denied that there would be any prejudice to the municipality in that the municipality was able to file a detailed plea in the matter and was accordingly able to investigate and assess the claim. A further point was made that the municipality had records of the complaints and various other complaints

by members of the public. As the respondent's employees had a duty to report illegal connections, these records must still exist.

24. Mr Masayimane also indicated that it was in the interests of justice that condonation be granted as the effect of dismissing the application would be that the doors of the court would be closed in respect of his claims.

25. In the matter of *Madinda vs Minister of Safety and Security, Republic of South Africa* (2008) 3 All 143 (SCA). Heher JA had the following to say about section 3 of the Act:

“[8] The phrase if [the court] is satisfied” in s3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set out by the parties. See eg Die Afrikaanse Pers Beperk vs Neser 1948(2) SA 295(C) at 297. I see no reason to place a stricter construction on it in the present context.”

26. He went further to say that:

“[10] The second requirement is a variant of one well known in cases of procedural non-compliance. See Towood Properties (Pty) Ltd vs South African Reserve Bank 1996(1) SA 215(W) at 227I – 228F and the case in there cited. “Good cause” looks at all those factors which bear on the fairness of the granting of relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the application, and any contribution by any other persons or parties to the delay and the applicant’s responsibility thereto”.

27. And further at [12] ... *“Good cause for the delay is not simply a mechanical matter of cause and effect. The court must decide whether the applicant has produced*

exceptional reasons for nullifying, in whole, or at least substantially, any probability on his or her part which attaches to the delay in serving the notice timeously. Strong merits may mitigate fault; no merits may render mitigation pointless. There are two elements that play in s4(b), viz the subject's right to have the merits of his case tried by a court of law and the right of an Organ of State not to be unduly prejudiced by delay beyond the statutory prescribed limit for the giving of notice ...

... calls for the court to be satisfied as to the latter. Logically, sub-paragraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so the consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court to the existence of good cause precluded the court from exercising its discretion to condone."

28. Heher JA went further at 18.3 to state the following ... *"Ignorance, inexperience, naivete, and simply lack of intelligence, individually or in any combination, could it seem to me, conduce to a reasonable belief that, once a complaint has been laid, the State, with the resources at its disposal, and as what she described in her reply as "the primary agent for the protection and enforcement of legal rights' will follow it up"; cf Mugwenas, above, at 155H – 156E. Indeed there is a provision in the Criminal Procedure Act (s) 300(1) which enables a court to make a compensatory order having the effect of a civil judgment, so that her belief finds some basis in law as well."*

29. Ms F[...], as in the Madinda *supra* case, consulted an attorney as soon as could reasonably be expected, given her misconception, and he in turn reacted expeditiously, in my view. Mr Masayimane did so as well.

30. As set out in Madinda *supra*, the first leg of section 3 requires applicant to satisfy the court that the respondent had not been unreasonably prejudiced by the failure to serve the notice timeously. In regard to prejudice, the court had the following to say:

At [21] ... *"The approach to the existence of unreasonable prejudice (not simply any level of prejudice, an aspect which the judgment of the court a quo blurs)*

requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exists often lies peculiarly within the knowledge of the respondent. Although the onus is on an applicant to bring the application within the terms of the statute, a court should be slow to assume prejudice for which the respondent itself does not lay a basis.”

31. In both Ms F[...]’s and in Mr Masayimane’s case, the alleged prejudice was the fact that witnesses may not recall events and that the records would not be easily available. In argument, both counsel accepted that a municipality is required to keep records for a number of years and these should be readily available. Especially in circumstances where Ms F[...] had immediately referred the matter to a Ward Councillor and the South African Police Services. In my view it is also significant that both cases involved an electrocution in the same area and in the same settlement. As the second electrocution took place within two days of the first electrocution, this must have been a red flag for the municipality and its officials and undoubtedly an urgent investigation would have followed, where a minor child had been electrocuted, and also an adult, within two days of each other.

32. In the matter of Le Roux and Another vs Johannes G Coetzee and Seuns and Another 2024(4) BCLR 522(CC), the Constitutional Court, in dealing with prescription set out the principal as follows at [40]:

“The knowledge that section 12(3) contemplates could be either actual or deemed. Actual knowledge relates to the subjective knowledge that a creditor requires of a fact are deemed knowledge which a creditor could have acquired by exercising reasonable care.”

33. In the Constitutional Court matter reference was made to prescription matters against professionals and whether the claimant became aware of a debt, which had in fact arisen because of negligence on the part of the professional defendant.

34. The court in Le Roux *supra* went further in dealing with prescription, by stating the following:

“[55] ... Links tells us that in such situations, prescription would only start to run when the creditor knows or on reasonable grounds should know that a wrong has been committed by an identified party and the facts giving rise to it. It is then that the creditor has knowledge of the identity of the debtor and the facts from which the debt arises. That prescription should start to run from that point accords with the language of s12(3), and gives effect to the rights in section 34 of access to court and does not unduly impede the right to a fair hearing and that a debtor is also entitled to under section 34.”

35. The relevance of prescription is that if a court is satisfied that a debt has been extinguished by prescription, condonation for the late filing of the section 3 notice should not be condoned.

36. In *Shoprite Checkers (Pty) Ltd vs Mafate N.O.* (CCT55/23) [2024] ZACC 16 the Constitutional Court stated the following principal in dealing with a litigant’s rights:

“[39] An overarching constitutional imperative in the interpretative exercise is to be found in section 39(2) of the Constitution, which provides that “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

Each side is appealing to a right protected in the Bill of Rights. Each calls in aid section 34 of the Constitution. The question that arises is: Whose appeal to section 34 must take precedence?”

37. And further at paragraph [41] the court stated the following:

“In this case as well, a balancing exercise is called for. It matters not that the adversaries rely on the same right that is section 34 of the Bill of Rights. The point is that each party relies on the right to advance different interests in the interpretative exercise. Shoprite Checkers is advancing the interest that there must be finality to litigation as otherwise there may be no fairness in a trial that takes place when the memory of witnesses has faded, when evidence has

been lost and when witnesses have died or are no longer available for whatever other reason. On the other side, the question is one of preserving the right of access to courts for as long as there is a section 13(1) impediment.”

38. In the present two matters it is this balancing of rights that needs careful consideration. The right of the municipality to have finality in litigation and the rights of the applicants to have their matters heard in court.

39. In the matter of *Truter and Another vs Deyssel* 2006(4) SA 168 (SCA) the court had to deal with the date upon which the running of prescription commenced. Van Heerden AJ had the following to say at 16:

“In a deliction claim, the requirements of fault and unlawfulness do not constitute factual ingredients of cause of action, but are legal conclusions to be drawn from the facts:

‘A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of an actual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.’

40. At paragraph 18 the court went further to state that:

“Cause of action” for the purposes of prescription thus means –

‘... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’

41. Further, at 19 ... *“as indicated above, the presence or absence of negligence is not a fact; it is a conclusion of law to be drawn by the court in all circumstances of this*

specific case. – Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running – it does not require knowledge of the relevant legal conclusions (that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions.”

42. In the matter of Dike vs Minister of Police and Another (2023) ZAECBHC at 15, Norman J found that in refusing condonation would amount to a refusal of an opportunity to ventilate all the issues before the trial court. In that matter, the applicant alleged that there was no prejudice as the respondents were the custodians of the case docket, relevant registers, files and statements relating to the applicant’s arrest, detention, assault and prosecution.

43. The court also found that it was not a legal impediment to seek legal advice and in fact it was prudent to do so as not every arrest would result in an action for damages. In that matter, the applicant also alleged that she was not aware of her rights as she was not *au fait* with the concept of arrest. In fact, as in these matters, she was not even aware that she had a claim against the Minister of Police. Norman J stated that following:

“[29] After the institution of the action, the first respondent pleaded to the combined summons and raised prescription as a special plea. The fact that prescription is being raised as a special plea does not on its own mean that the claim has in fact prescribed. Prescription is a legal defence which may warrant the leading of evidence at the trial and the trial court will decide whether the matter is indeed prescribed. The respondent does not advance any facts whatsoever upon which he based his contention that the applicant had knowledge of the identity of him as the debtor more than three years before the action was instituted.”

44. I am satisfied on the facts alleged by Ms F[...] and Mr Masayimane, and on the pleaded cases, that the applicants have given an adequate explanation for the delay in giving the section 3 notice. In Ms F[...]’s matter, the claim of the minor child, in any event, has not prescribed and this is not a factor to consider. The only factor for

consideration was whether her personal claim had prescribed. The periods of delay are also not excessive, in the circumstances.

45. I am also not convinced that the prejudice alleged by the municipality is real in that, as a municipality, they are required to keep the necessary records of any incident such as electrocutions under their control for a considerable period of time. Not only did Ms F[...] refer this matter to a Ward Councillor, she also referred the matter to the South African Police Services and who, in turn, opened an investigation and a docket.

46. I am also persuaded by the argument that the municipality was able to plead fully to the particulars of claim and will be able to call all the necessary witnesses, and produce all the necessary evidence, in defence of the claims.

47. The municipality has also failed in each matter to plead any facts which can result in a conclusion that the plaintiffs were aware of their right to claim as early as the date when the causes of action arose. The opposing affidavits and the pleadings, in the main actions, are silent on this issue.

48. The overall impression, applying a fair mind to the facts set out in the papers, is that the applicants were unaware of their right to claim and this ignorance may well have stemmed from the fact that they were inexperienced and naïve litigants from a previously disadvantaged background.

49. I find that both the applicants fall into the category of disempowered and marginalised people, given their socio-economic status as set out by the Constitutional Court in *Road Accident Fund and Another vs Mdeyide* 2011(2) SA 26(CC).

50. On the basis of the evidence given by both Ms F[...] and Mr Masayimane I cannot find that their right to claim has in fact prescribed. The fact that prescription has been raised in the special plea does not, on its own, mean that the claim has in fact prescribed. As indicated in the *Dike vs Minister of Police* matter *supra* prescription is a legal defence which may warrant the leading of evidence at the trial and the trial court will in due course decide whether the matter has indeed prescribed.

51. The following order is made:

51.1 Condonation is granted for the applicants' failure to serve the notices contemplated in section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 within the period laid down in section 3(2)(a) of the Act;

51.2 The respondent is to pay the costs of the applications on scale B in terms of rule 69(7).

B.B. BRODY
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

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